KANG KOK KWANG

v.

BUKIT BARU CENTRE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
WAN ADNAN J
[CIVIL SUIT NO. D5-22-1580-90]
30 OCTOBER 1990

COMPANY LAW: *Trusts - Articles of association - Relationship between trustees and their "cestui que" - Trust not recognised by companies - Companies Act 1965 s. 163(4) .*

CONSTITUTIONAL LAW: *Courts - Whether has jurisdiction to hear an ex parte oral application to vary or dissolve an injunction - Prerequisites.*

CIVIL PROCEDURE: *Injunction - Ex parte - Whether Court has jurisdiction to hear an ex parte application to vary or dissolve an injunction - Interlocutory - Right to obtain interlocutory action is not a cause of action.*

CIVIL PROCEDURE: *Striking out summarily - Plain and obvious cases - Whether omission of allegations in statement of claim can be made good by affidavit evidence - Rules of the High Court 1980 O.18 r. 19.*

This was an application by the 1st, 3rd, 4th and 5th defendants, D1, D3, D4 and D5 to strike out the plaintiff's writ of summons and the statement of claim on the ground that they disclose no reasonable cause of action against them under O. 18 r. 19 of the Rules of the High Court 1980.

The plaintiff a director of the 1st defendant, in his statement of claim sought various declarations as to his ownership in the defendant companies and sought to restrain the directors, servants, agents and or nominees from dealing with the shares in any way which would prejudice his interests in the companies.

On 4 October 1990 on an *ex parte* application by the plaintiff the necessary orders that he sought in relation to D1, D3, D4, D5 were granted. D1, D3, D4, D5 in turn on 5 October 1990 sought to vary, without any formal written application, the third para. of the said order by the deletion of certain words of the *ex parte* order. This was based on an urgent application as D5 was due to hold an extraordinary general meeting that same morning in relation to the approval of the acquisition of shares in D4.

The plaintiff claims that he was the actual beneficial owner of 50% equity in D1 and beneficial owner of 30% equity in S, a company to which the Ministry of Financial Planning and Development Sabah had granted a gaming licence.

The issues for determination were whether the *ex parte* application to vary the injunction could be granted and whether D1 could recognise any equitable ownership of shares in its company. The plaintiff alleges that Y held equitable interest in the shares and that Y had sold the plaintiff his equitable interest in D1.

Held:

[1] The Court has jurisdiction to hear an *ex parte* application to vary or dissolve an injunction which had been obtained on an *ex parte* application even when made orally if it is sufficiently shown that time does not permit a written formal application to be made.

[2] The omission of allegations in the statement of claim cannot be made good by affidavit evidence.

[3] A right to obtain an interlocutory injunction is not a cause of action. It is dependent upon there being a pre-existing cause of action. The plaintiff has not succeed in establishing a cause of action.

[4] (a) A company cannot recognise any trust except as provided in s. 163(4) of the Companies Act 1965 which should be read in conjunction with the articles of association.

(b) It is therefore of no concern to D1 whether or not Y has any equitable interest in the shares; so far as D1 is concerned the registered shareholders have the absolute right to the entirety in their shares.

[5] If as the plaintiff alleges, S had been wronged, the proper person to bring the action is S; the plaintiff is not entitled to bring an action in respect of the wrong done to S.

[6] (a) The statement of claim only discloses a complaint against D2 and Y; there is no allegation against D1, D3, D4 and D5. Therefore, the allegations against D2 and Y do not implicate the other defendants.

(b) The omission of allegation in the statement of claim as to D4 not being a *bona fide* purchaser for value without notice cannot be made good by affidavit evidence.

[7] There is no allegation of wrong doing at all against D1; the plaintiff merely wants to restrain D5 from acquiring the entire share capital of D4. As there is no pre-existing cause of action against D1, there is no right to obtain an interlocutory injunction; this right is not a cause of action but is merely ancillary and incidental to the pre-existing cause of action.

[Statement of claim held to be unsustainable against D1, D3, D4 and D5.]

Cases referred to:
Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] LR 1136
Tractors (M) Ltd. v. Tio Chee Hing [1975] 2 MLJ 1
A.G. of Duchy of Lancaster v. L. & N.W. Railway [1982] 3 Ch 274
London City Agency (JCD) Ltd. and Anor. v. Lee and Ors. [1970] 1 Ch 597
Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah [1979] 2 MLJ 240
Ex parte Mexican Santa Barbara Mining Company [1890] 24 QBD 613
United Malayan Banking Corp. Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. [1983] 1 MLJ 206 [1982] CLJ (Rep) 358
Siskina v. Distos Compania Naviera S.A. [1979] LR 252

Legislation referred to:
Companies Act 1965, ss. 163, 163(4)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Proctor (Y.S.Woo with him); M/s. Y.S. Woo & Proctor
For the 1st - 4th defendants - G. Sri Ram; M/s. Sri Ram & Co.
For the 5th defendant - Lim Kian Leong; M/s. Lim Kian Leong & Co.

JUDGMENT

Wan Adnan J:

This is an application by the first, third, fourth and fifth defendants to strike out the plaintiff's writ of summons and the statement of claim on the ground that they disclose no reasonable cause of action against them under O. 18 r. 19 of the Rules of the High Court 1980.

It is a well-established principle that the summary power under O. 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases. *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong (PC)* [1970] LR 1136. The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. (*Tractors (M) Ltd. v. Tio Chee Hing* [1975] 2 MLJ 1 (PC). The summary procedure under O. 18 r. 19 can only be adopted when it can be clearly seen that the claim is on the face of it obviously unsustainable. (*A.G. of Duchy of Lancaster v. L. & N.W. Railway* [1982] 3 Ch 274).

The plaintiff claims for the following orders:

(a) A declaration that the plaintiff is the owner of 50% of the entire share capital of Bukit Baru and an order that the plaintiff be registered as a member holding 50% of the entire paid up share capital in the Register of Members of Bukit Baru.

(b) A declaration that Bukit Baru owns 60% of the entire paid up share capital of Diriwan and an order that Bukit Baru be registered as a member holding 60% of the entire paid up share capital in the Register of Members of Diriwan.

(c) As a consequence, a declaration that the sale of the entire paid up share capital of Diriwan to Lotteries Corp. on 30 October 1989 and or subsequent transactions thereafter be held unlawful, null and void and of no effect.

(d) An order that Lotteries Corp. or its directors, servants, agents, nominees or whatsoever be restrained from approving and or registering the sale and or transfer of the said 7.4 million shares of RM1 each in Lotteries Corp., which shares were originally purportedly issued for the purported purchase of the entire paid up share capital of Diriwan.

(e) An order that Lotteries Corp. and or its shareholders be restrained from proceeding with the proposed sale of its entire paid up share capital to any third party including Mycom until after the aforesaid 7.4 million shares have been identified and removed from the proposed sale.

(f) An order that Mycom or its directors, servants, agents, nominees whatsoever be restrained from purchasing and or approving the purchase of the said entire paid up share capital of Lotteries Corp. pending the identification and removal of the said 7.4 million shares of RM1 each in Lotteries Corp.

On the 4 October 1990 on the plaintiff's *ex parte* application I granted the following orders:

(1) That Lotteries Corporation (Sabah) Sdn. Bhd. or its directors, servants, agents, nominees or whatsoever be restrained from approving and or registering the sale and or transfer of the 7.4 million shares of RM1 each in Lotteries Corporation (Sabah) Sdn. Bhd., which shares were originally purportedly issued for the purported purchase of the entire paid up share capital of Diriwan Corporation Sdn. Bhd.

(2) That Lotteries Corporation (Sabah) Sdn. Bhd. and or its shareholders be restrained from proceeding with the proposed sale of its entire paid up share capital to any third party including Mycom Berhad until after the aforesaid 7.4 millions shares have been identified and removed from the proposed sale.

(3) That Mycom Berhad or its directors, servants, agents, nominees whatsoever be restrained from purchasing and or approving the purchase of the said entire paid up share capital of Lotteries Corporation (Sabah) Sdn. Bhd. pending the identification and removal of the said 7.4 million shares of RM1 each in Lotteries Corporation (Sabah) Sdn. Bhd.

(4) That the costs of and occasioned hereof be costs in the cause.

On the next day at about 9 a.m. Encik Sri Ram, Counsel for the first, second, third and fourth defendants and Encik Lim Kian Leong Counsel for the fifth defendant appeared before me on an urgent basis and, without any formal written application, applied to vary the third para. of the said order by the deletion of the words "purchasing and or approving the purchase of" and by the addition of the words "completing the purchase" in their stead. It was urgent because the Extraordinary General Meeting of the fifth defendant was due to be held at 10 a.m. on the same morning and the meeting was called specially to approve the acquisition of the shares in Lotteries Corporation (Sabah) Sdn. Bhd. The variation sought would just enable the fifth defendant to proceed to approve the resolution but they would still be restrained from completing the purchase.

Megarry J in *London City Agency (JCD) Ltd. and Anor. v. Lee and Ors.* [1970] 1 Ch 597 said, "In my judgment the Court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the Court doing so in a proper case. I do not accept what is said in *Halsbury* as a correct statement of the present law. The Court will grant an interlocutory injunction on an *ex parte* application if a case of sufficient cogency is made, and no reason has been suggested why, if an application *ex parte* to discharge or vary such an injunction is supported by sufficiently cogent grounds, the Court should not do what is sought. If time permits, it is plainly preferable that any such application should be made upon due notice; but in a case of sufficient urgency, I do not see why an injunction granted *ex parte* should be immune from being varied or discharged upon an *ex parte* application. I cannot believe it to be the law that however clearly it has been established that would be wrong for the injunction to continue in force unchanged, the Court is impotent to discharge or vary it until notice of motion has been given and has expired, especially where (as here) Counsel for those entitled to the injunction has in fact been present on the hearing of the *ex parte* application for the discharge or variation. Accordingly, in my judgment, the only question here is whether the applicants *ex parte* have made out a sufficient case for discharging or varying the injunction."

I agree with the above proposition. The Court has jurisdiction to hear an *ex parte* application to vary or dissolve an injunction which had been obtained on an *ex parte* application even when made orally if it is sufficiently shown that time does not permit for a written formal application to be made.

I found there were sufficient grounds for me to allow the Counsel to make the oral *ex parte* application to vary the injunction and I found the injunction ought to be varied as sought. I accordingly varied the injunction upon the Counsel's undertaking to file formal written application within 14 days from date of the order.

In the statement of claim the plaintiff claims that he is and was at all material times a Director of the first defendant. He says that at all material times prior to 7 November 1987 one Yap Eng Seng was the absolute beneficial owner of the entire paid up capital of the first defendant. The shares were held by Teh Keng Bean and Teh Kim Hoe as his nominees. He further says that at all material times the first defendant's assets included a 60% shareholding equity in Supermuda Sdn. Bhd. (Supermuda) to whom the Ministry of Financial Planning and Development Sabah had granted a gaming licence.

He then says that on 3 November 1987 the said Yap Eng Seng offered to sell to him the entire shareholding in the first defendant including the 60% equity in Supermuda for the sum of RM400,000. On 4 November 1987 he approached the second defendant and offered him a 50% stake in the first defendant for a sum of RM400,000. The second defendant

accepted the offer and paid him RM400,000. The plaintiff in turn paid the said sum to the nominee of Yap Eng Seng. Thereafter, the plaintiff says, he and the second defendant each owned beneficially 50% of the equity shareholding of the first defendant and 30% in the equity shareholding of Supermuda. The plaintiff further alleges that later the said Yap Eng Seng purporting to write for and on behalf of Supermuda requested the Sabah Government to issue the said gaming licence to the third defendant as nominees of Supermuda. The Sabah Government did as requested and issued the gaming licence to the third defendant. In para. 17 of the statement of claim the plaintiff alleges, "17. Thereafter the 2nd. defendant and Yap Eng Seng (who is his younger brother) colluded and conspired together to deny the plaintiff of his interest in Bukit Baru, Supermuda and Diriwan." He sets out the particulars to support his allegation of the said collusion and conspiracy. He then says that the third defendant was sold to the fourth defendant for RM7.4 million the consideration being satisfied by the issue of 7.4 million shares of RM1 each in the fourth defendant. The plaintiff mentions the fifth defendant only in para. 21 of the statement of claim when he says "On or about 16 July 1990, Mycom announced a proposed acquisition of the entire share capital of Lotteries Corp. for the total consideration of RM140,741,000 and the same is now subject to shareholders' approval at the Extraordinary General Meeting of Mycom which is to be held on 5 October 1990."

The plaintiff says Yap Eng Seng was the beneficial owner of the entire shareholding of the first defendant. There was a contract between him and the said Yap Eng Seng through his nominees for the purchase of the entire shareholding in the first defendant for a consideration of RM400,000 which he had paid with the money provided by the second defendant. What is the position of Yap Eng Seng in the first defendant? The first defendant is a private limited company incorporated under the Companies Act 1965. Article 6 of its Articles of Association provides as follows:

> No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entirety thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of Court.

Section 163(4) of the Companies Act 1965 provides as follows:

> (4) Except as provided in this section no notice of any trust expressed implied or constructive shall be entered on a register or branch register or be receivable by the registrar and no liabilities shall be affected by anything done in pursuance of subsection (1), (2) or (3) or pursuant to the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done.

In *Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah* [1979] 2 MLJ 240, the Federal Court said:

> A company does not take cognisance of trusts except in so far as is provided for in s. 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder.

In *Re Perkins. Ex Parte Mexican Santa Barbara Mining Company* [1890] 24 QBD 613, Lord Coleridge, CJ said:

> In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestuis que* trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register.

It is therefore no concern to the first defendant whether or not Yap Eng Seng has any equitable interest in the shares. So far as the first defendant is concerned the registered shareholders have the absolute right to the entirety in their shares. For the same reasons the plaintiff's claim that he owned beneficially 50% equity shareholding in the first defendant through the purchase of Yap Eng Seng' a beneficial interest cannot hold good. The plaintiff's further claim that he owned beneficially 30% equity in Supermuda also for the same reasons cannot stand.

The plaintiff's further allegation against Yap Eng Seng is that he caused the gaming licence granted to Supermuda to be issued by the Sabah Government to the third defendant. The allegation is that Supermuda had been wronged. Then, in such a case, the proper person to bring the action in respect of that wrong is Supermuda. The plaintiff is not entitled to bring an action in respect of the wrong done to Supermuda. The plaintiff's action is not a derivative action. Then he alleges that the sale of the third defendant to the fourth defendant was without his knowledge and approval. I find there was no need for his approval.

I find the statement of claim only discloses a complaint against the second defendant and Yap Eng Seng. According to the allegations the unlawful acts were all committed by them. There is no allegation against the first, third, fourth and fifth defendants. The allegations against the second defendant and Yap Eng Seng do not implicate the other defendants.

The plaintiff in his affidavit in reply alleges that the fourth defendant was not a *bona fide* purchaser for value without notice as the second defendant was in *de facto* control for both the third and the fourth defendants. There is no such allegation in the statement of claim. This omission cannot be made good by affidavit evidence. *United Malayan Banking Corp. Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 MLJ 206.

As against the fifth defendant there is no allegation of any wrongdoing at all. There is no complaint at all against the fifth defendant. All that is said about the fifth defendant is that the fifth defendant is proposing to acquire the entire share capital of the fourth defendant. The plaintiff merely wants to restrain the fifth defendant from making the acquisition.

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

per Lord Diplock in *Siskina v. Distos Compania Naviera S.A.* [1979] LR 252.

For the above reasons I find that the statement of claim on the face of it is obviously unsustainable against the first, third, fourth and fifth defendants. The plaintiff has no cause of action against them. I therefore made the following order:

(1) The writ of summons and the statement of claim against the first, third, fourth and fifth defendant be struck out.

(2) The order of Court made on 4 October 1990 be set aside and the injunctions dissolved.

(3) The Senior Assistant Registrar to assess the damages suffered by the said defendants.

(4) The plaintiff is to pay the costs.

Also found at [1991] 1 CLJ 343